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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MANFRED ALKHAS, Defendant and Appellant.	H043923 (Santa Clara County Super. Ct. No. C1361883)

Defendant Manfred Alkhas, a chiropractor, was charged with sexual battery by fraud and sexual penetration after a patient accused him of touching her breasts and vagina during an appointment. A jury found him guilty of sexual battery by fraud, but did not reach a verdict on the sexual penetration count. The trial court sentenced Alkhas to two years in state prison.

Alkhas raises numerous claims on appeal. First, he contends the trial court erred by failing to give the jury a unanimity instruction. Second, he contends his trial counsel provided ineffective assistance by refusing instructions on lesser included offenses. Third, he contends the trial court erroneously admitted evidence of prior sexual misconduct under Evidence Code section 1108. Fourth, he contends his trial counsel was ineffective by failing to question a prospective juror about her racial biases and failing to exercise a peremptory strike against her. Fifth, he contends the cumulative impact of multiple errors requires reversal. Finally, he briefly raises several miscellaneous claims of ineffective assistance of counsel.

For the reasons below, we conclude these claims are without merit. We will affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural Background

The prosecution charged Alkhas with two counts: Count 1—sexual battery by fraud (Pen. Code, §§ 242, 243.4, subd. (c))[1]; and count 2—sexual penetration where the victim was unconscious of the nature of the act (§ 289, subd. (d)). The jury found him guilty on count 1 but hung on count 2. The trial court declared a mistrial on count 2. The court imposed a term of two years in state prison.

B. Facts of the Offense

1. Overview

Danielle Doe began visiting Alkhas for chiropractic treatments several times a week in January 2013. She was 21 years old at the time. During a visit in July 2013, Alkhas invited her into his office, closed the door, and asked her to perform a stretching routine. Alkhas put his hands on Danielle's body while she was stretching on the floor. In the course of touching her, Alkhas put his hands under her bra and touched her nipples. He then instructed her to pull down her jeans and underwear, which she did. While massaging her inner thigh, Alkhas touched her vagina.

After the prosecution charged Alkhas, a former student of his from his religious community came forward and alleged he had molested her when she was a young girl more than 20 years ago. The prosecution introduced her testimony under Evidence Code section 1108.

2. Testimony of Danielle Doe

Danielle was referred to Alkhas by a friend who described him as "a great chiropractor," "a Christian," and "really friendly." On her initial visit, Danielle saw a

[1] Subsequent undesignated statutory references are to the Penal Code.

bible in his waiting room, and Christian music was playing throughout the office. Danielle filled out an intake form by listing some of her health history and complaints, including shoulder and neck strain. She also told him she had difficulty breathing during intense workouts.

In that initial visit, Alkhas conducted an x-ray examination of Danielle's back, requiring her to wear a backless hospital gown without her shirt and bra. After he took the x-rays, he told her to put her arms out and lowered her gown to her elbows. Danielle's breasts were exposed, and she felt uncomfortable. Alkhas then felt her upper chest area with both hands, but he did not touch her breasts. Danielle later spoke with her friend about the incident, but the friend assured her it was normal.

In July 2013, Danielle visited Alkhas following a recent plane flight that was causing her some lower back pain. Danielle's mother, who was also one of Alkhas's patients, waited outside in the car. Danielle was wearing a tank top and jeans.

During the intake for the appointment, Danielle indicated she was experiencing lower back pain by using a computer monitor that displayed a diagram of the body. She then told Alkhas she had been uncomfortable on the plane and her lower back was hurting. She rubbed the small of her back above her buttocks area. Alkhas took her into a treatment room where he adjusted her spine and treated her with electrical stimulation.

After completing the electrical stimulation, Alkhas told Danielle he wanted to go over some stretches with her. At that point, he brought her into his office and closed the door. Danielle began performing a stretch that involved getting on her hands and knees while raising one arm and one leg. Alkhas used his hands to adjust her limbs, put his hands on her waist, and said he could feel a spasm.

Alkhas then instructed Danielle to lie on her back on top of a foam roller such that her back was arched and her pelvis was up in the air. He grabbed the bottom of her tank top with both hands and pulled it up to just beneath her breasts, exposing her stomach. Using the palms of his hands, he started pressing on her stomach in a circular motion. He

said he was following a spasm, but Danielle could not feel any spasms. After massaging her stomach for some time, he moved his hands up her stomach and put them under her bra, touching her breasts and nipples twice. The first time he touched them, Danielle was not sure it happened, but when he touched them the second time, it confirmed her initial impression, and she felt in shock. She froze up and did not know what to say.

Alkhas then moved his hands back down her stomach and said he was following a spasm. He put his finger inside the waist of her pants and told her to unbutton her jeans. She unbuttoned and unzipped her jeans, and Alkhas told her to "[j]ust fold them down." She did so, exposing her underwear, and he moved his hand down inside her underwear to the top of her pubic hairline. He again said he was following a spasm.

Alkhas then told Danielle to turn over and get on her knees, which she did. He told her to pull down her pants to where she was "comfy." She did so, pulling her pants down below her buttocks and exposing her panties. He put his hands on her hips, and told her to "[p]ull your panties down to where you're comfortable." She pulled down the back of her panties, exposing the crack of her buttocks. By that point, Alkhas had put some lubricating gel on his hands, and he said he did not want to get it on her underwear, so he pulled her underwear further down past her buttocks, exposing her vagina. While gripping her right hip and thigh with his right hand, he again said he was following a spasm.

At that point, Alkhas's left hand was touching Danielle's inner thigh area near her vagina. His hand was near the crevice between her inner thigh and vagina, and he was moving his hand in a back and forth motion. Danielle then felt the outside of his hand touching her vagina. He moved his hand in a back and forth motion a few more times, and she could feel the outside of his fingers on her vagina. At that point, he turned his hand facing upward, and she felt the palm of his hand on her vagina. He did not put his finger inside her vagina, but she could feel his fingers in between her labia. He made this

motion three or four times. Danielle felt violated. She was concerned that he might be getting aroused, but she could not see whether he had an erection.

Alkhas then told Danielle to button up her pants and told her he wanted to schedule a massage. She stood up and buttoned up her pants. He went to his desk to write down his cell phone number on a yellow Post-it note. Danielle could tell he was uncomfortable because he was rushed and trying not to look her in the eye. He offered to give her a massage later that day, indicating that he would perform it himself. She had gotten massages as part of her treatment before, but only from a female masseuse who worked for him. Danielle shook her head and said her mother was waiting in the parking lot, whereupon she left.

3. Testimony of Anne Marie Doe

When Anne Marie Doe[2] was around five to seven years old, she attended a foreign language class Alkhas was teaching at an Assyrian community center. Anne Marie testified that Alkhas touched her inappropriately on multiple occasions during this time period.[3]

Alkhas drove Anne Marie home from class on occasion. The first time he touched her, they were parked in a car on the street next to a community trail. He had books in the back seat of the car, and he asked Anne Marie to get up to look at them. He then touched her vagina through her clothes with his hand. Anne Marie felt uncomfortable and said she wanted to go home. Alkhas told her, "Okay. We're going to go home, but you can't tell anybody. This is our secret."

The next touching also occurred while they were parked in a car. He pulled her shirt forward, looked down the front of it, and touched her breast area. He then pulled

[2] Anne Marie Doe was unrelated to Danielle Doe. We refer to both parties by their first names to avoid confusion.

[3] Other evidence in the record indicates these events took place in the mid-1980s.

her underwear down and looked at her naked, but he did not touch her vagina. Afterwards, he took her home.

On another occasion, Alkhas touched Anne Marie's vagina under her underwear while they were in a car. He was rubbing her, and after a while, "there was like an explosion" that was "borderline painful." At the time, she didn't understand what the feeling was, but later she realized she had experienced an orgasm. He again told her not to tell anybody.

Anne Marie also testified that Alkhas once touched her vagina and breasts over her clothes in the kitchen of the community center. Afterwards, he gave her a ride home.

4. Testimony of Manfred Alkhas

Alkhas testified in his defense. He stated that Danielle came to his office complaining of pain in her middle and lower back area due to a recent plane ride. He wanted to review some stretching exercises he had given her to practice. He took her to his office because the treatment rooms were too small to conduct the stretches comfortably.

They began to go over the exercises, and Alkhas corrected one of them slightly. He was concerned about a prior tail bone injury she had experienced in 2009. He had her lie down on a mat, and he placed a foam roller under the middle of her back. This caused her to arch her back and open up her ribs, whereupon she said, "Oh, my God. This feels so good."

Alkhas wanted to do a quick assessment of the muscles around Danielle's rib cage area. He conducted a "soft tissue evaluation," which involved palpating the muscles, tissues, and ligaments. He put some lubricating gel on his left hand to make it more comfortable. He put his hands inside her shirt to feel the tone of the muscle. He felt the mid-sternal area between her breasts to check the joints of the sternum and the ribs. He testified that "it is possible" he may have touched her nipples but he was not purposely trying to touch them in any way.

When Alkhas was done with this procedure, he told Danielle to get on her hands and knees as part of a normally accepted procedure. He wanted to examine her tail bone, sacrum, and the entire pelvic area. He did not explain that he was going to put his hands down near her crotch area because she had been a patient for six months and he thought she trusted him. He then had her lower her jeans to a comfortable level so that he could examine the right side of her sacrum and tail bone area. He asked her if he could move her underwear "slightly lower," and she said, "yes," so he lowered her underwear. The particular area of concern was her sacrotuberous ligament, which is located between the front part of the sacrum and the hip bone. This ligament is about two or three inches away from the vagina.

Alkhas examined Danielle's sacrotuberous ligament by pushing down slowly with his hand and moving along the fibers of the ligament to check for pain or discomfort. He was using a rhythmic motion up and down the ligament. He also checked the surrounding muscles in the lower gluteal area. He felt a nodular area and asked Danielle if it was painful. She replied affirmatively, put her head forward, and closed her eyes, physically reacting to the pain. Alkhas testified that he did not have any specific recollection of actually touching her vagina. He denied that he was sexually excited.

Alkhas then performed some additional palpation to the lower gluteal area where the buttock fold is, and he checked the ischial tuberosity area, which is where the thigh muscles attach to the pelvis. This area is very close the pubic hairline around the vagina. He did not know whether he touched her pubic hair, but he was near that area. He was not doing it for any kind of sexual purpose.

Alkhas denied that he offered to personally give Danielle a massage. He gave her his cell phone number on a yellow Post-it note, but he gives the number to all his patients, and it is standard for patients to call him on it.

Alkhas estimated that he had seen thousands of female patients during his 23 years as a chiropractor. None had ever complained to him that they thought he was touching them inappropriately.

Alkhas testified that he absolutely did not do anything inappropriate to Anne Marie. He always rode with his brother to and from the community center where he taught language classes. He attributed the accusations to a religious rift that arose in the Assyrian community during that time period. He was accused of heresy and blasphemy for teaching children that Mary, the mother of Jesus Christ, had given birth to other children who were not immaculately conceived. This controversy lasted for several years, and some of the parents of children in his class forbade them from attending.

II. DISCUSSION

A. Lack of Unanimity Instruction on Count 1

Alkhas contends the trial court erred by failing to give the jury a unanimity instruction as to the conduct charged in count 1. He argues that touching Danielle's nipples and touching her vagina constituted two separate acts, and the jury should have been instructed that it must agree unanimously on which act constituted the offense. The Attorney General contends no such instruction was required because the charge stemmed from a continuous course of conduct, and any failure to instruct was harmless even assuming an instruction was required.

1. Background

Count 1 alleged that Alkhas "did touch (an) intimate part(s), breasts and vagina of another person, Danielle Doe, while the victim was at that time unconscious of the nature of the act because the defendant(s) fraudulently represented that the touching served a professional purpose." Count 2 charged Alkhas with committing "an act of sexual penetration" while the victim was "unconscious of the nature of the act." The trial court did not give a unanimity instruction. The jury convicted Alkhas on count 1 but could not reach a verdict on count 2, whereupon the court declared a mistrial on that count.

After the verdict, Alkhas retained new counsel and moved for a new trial based on the trial court's failure to give a unanimity instruction, among other grounds. His argument was identical to the claim raised here, and the prosecution opposed it on the ground that the acts underlying the offense constituted a continuous course of conduct. At a hearing on the matter, Alkhas's prior trial counsel testified that he carefully considered whether to request a unanimity instruction on count 1. He testified that he made a strategic decision not to do so because he was concerned the prosecution would add additional counts in response. Counsel testified, "I thought there was a real risk if we pushed that argument. And I purposely kept close counsel on this. If we pushed that argument-if we pushed that argument, that you, as the district attorney, would move to amend and add additional counts because they were all mentioned at the prelim. So it could be done. And I was very, very concerned about that. I wanted to minimize the number of counts." He added that he believed his decision was "borne out by the fact that we had a hung jury" on count 2.

The trial court denied the motion for a new trial. The court acknowledged that a trial court would have a sua sponte duty to give the instruction under certain facts, but the court found the evidence did not support a finding that the conduct constituted two separate acts. The court stated, "[T]he circumstances in this particular case are such where any juror who believed that he inappropriately touched her breasts would also believe that he inappropriately touched her vagina because you either believe the victim about that or they do not."

2. Legal Principles

"[A] unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or

(2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*People v. Russo* (2001) 25 Cal.4th 1124, 1135.)

"The unanimity instruction is not required when the acts alleged are so closely connected as to form part of one transaction. [Citations.] The 'continuous conduct' rule applies when the defendant offers essentially the same defense to each of the acts and there is no reasonable basis for the jury to distinguish between them. [Citation.]" (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.)

"[A]ssertions of instructional error are reviewed de novo. 'Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference.' " (*People v. Shaw* (2002) 97 Cal.App.4th 833, 838, quoting *People v. Waidla* (2000) 22 Cal.4th 690, 733.)

3. No Unanimity Instruction Was Required

The parties dispute whether the touching of the breasts and the vagina constituted two separate acts or a continuous course of conduct. Alkhas contends that one or both of the nipple touchings were distinct from the touching of the vagina because Danielle's state of mind changed between the first touching and the last. He argues that the jury "likely mixed and matched" these acts, which is the precise outcome a unanimity instruction is designed to prevent. He points to the fact that the jury hung on count 2 as proof that "some jurors distinguished between acts either on the basis of doubt as to whether they took place or whether they were purposeful and/or done with sexual intent." The Attorney General contends all the touching occurred during the same course of conduct because the conduct occurred within the span of several minutes, and Alkhas was consistently acting "[u]nder the guise of performing a chiropractic examination."

We agree with the Attorney General on this point. Alkhas's defense was the same with respect to the entire course of conduct: He argued that he had no sexual intent, and that the entire event took place as part of a medically legitimate chiropractic examination. The jury must have rejected this defense in finding Alkhas guilty on count 1. This situation is analogous to that in *People v. Champion*, wherein the high court held no unanimity instruction was required because "any juror believing that defendant [] committed one of the two rapes testified to by [the victim] […] would inexorably believe that he also committed the other." (*People v. Champion* (1995) 9 Cal.4th 879, 932, overruled on other grounds in *People v. Combs* (2004) 34 Cal.4th 821.) Here, the jury must have discredited Alkhas's claim that he only would have touched Danielle's nipples as part of a legitimate medical examination, which implies he did not touch her vagina with the same lack of intent.

Alkhas disputes this logic by pointing to the jury's failure to reach a verdict on count 2. Alkhas argues that "If the most serious act was not proven to some of the jurors, we cannot presume that all of the other touchings were in fact fully accepted as having happened, that the other alleged touchings all had a sexual nature, and took place under the (false) guise of treatment, all of which elements must exist for a touching to be criminal." But count 2 did not simply allege a *touching* of the vagina; rather, the count required the jury to find Alkhas *penetrated* a genital opening. Thus, the jury could have found Alkhas failed to commit the actus reus of the offense while discrediting his claim that he was acting solely for legitimate medical purposes. Accordingly, we conclude this claim is without merit.

B. Ineffective Assistance of Counsel for Refusing Instructions on Lesser Included Offenses

Alkhas contends his trial counsel provided ineffective assistance of counsel by asking the court not to instruct the jury on the lesser included offenses of assault or battery. The Attorney General contends trial counsel had a valid strategic reason to

refuse such instructions because none were warranted. The Attorney General further contends Alkhas cannot show prejudice even assuming counsel's performance was deficient.

1. Background

Trial counsel for Alkhas had initially requested instructions on lesser included offenses, but he withdrew the request before the jury was so instructed. The trial court inquired as to counsel's change of mind: "We had included the lesser included offenses per counsel's request, and at sidebar you indicated that you have decided to not request those. It is in fact your request not to have the lessers in this case; is that correct?" Counsel responded affirmatively and addressed Alkhas directly as follows: "Dr. Alkhas, you and I have thoroughly discussed the advisability of having the lesser included offenses contained in the jury instructions; is that correct?" Alkhas responded, "Yes." Counsel added, "And after discussing it, we've jointly reached the conclusion that including those is not necessary; is that correct?" Alkhas again responded, "Yes." Accordingly, the trial court modified the proposed instructions and verdict forms to remove any reference to the lesser offense of assault on count 1 and the lesser included offenses of both assault and battery as to count 2.

2. Legal Principles

To establish ineffective assistance of counsel, Alkhas must show that counsel's performance was deficient and that he was prejudiced by the deficiency. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-217 (*Ledesma*).) To prove prejudice, the defendant bears the burden to show a reasonable probability that, but for his trial counsel's errors, the result would have been different. (*Id.* at pp. 217-218.) A reasonable probability is one " 'sufficient to undermine confidence in the outcome.' " (*Id.* at p. 218, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 693-694.) Deficient performance is rarely shown if there was a tactical reason for trial counsel's conduct. (*People v. Cruz* (1980) 26 Cal.3d 233, 255-256.)

3. Alkhas Suffered No Ineffective Assistance of Counsel

Alkhas contends his trial counsel was constitutionally ineffective in withdrawing the request for instructions on the lesser included offenses of assault and battery. The Attorney General does not dispute that assault and battery are lesser included offenses of sexual battery by misrepresentation. Rather, the Attorney General contends no such instructions were warranted because, given the evidence in the record, there was no reasonable possibility that a jury would acquit Alkhas of the charged offense while convicting him of simple assault or battery.

We agree with the Attorney General. A trial court has no sua sponte duty to give a jury instruction unsupported by substantial evidence. (*People v. Bolden* (2002) 29 Cal.4th 515, 558.) " 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[]" ' that the lesser offense, but not the greater, was committed. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) Alkhas puts forth no theory nor any supporting evidence for any theory that would allow a reasonable jury to acquit him on the charged offense while convicting him of assault or battery. To convict Alkhas of sexual battery by misrepresentation, the jury must have found that Danielle only "consented" to being touched because Alkhas misrepresented his motives as being medically legitimate—that is, that Alkhas touched her under the fraudulent guise of chiropractic treatment. Alkhas puts forth no other theory under which the touching would have constituted assault or battery but not battery by misrepresentation. His defense was that the exam was conducted for legitimate medical reasons, in which case his conduct would not have constituted assault or battery. In other words, an acquittal on either lesser offense would have been required if the jury had not found misrepresentation. (See *People v. Robinson* (2016) 63 Cal.4th 200, 204 [misdemeanor sexual battery cannot be deemed a lesser included offense of sexual battery by misrepresentation of professional purpose].) Similarly, if he had touched

Danielle accidentally, or had not touched her at all, he would not be guilty of any offense. On this record, no reasonable jury could have found him not guilty of sexual battery, but guilty of assault or battery.

Alkhas contends the jury could have found simple assault because the prosecution argued that he should have been more respectful of Danielle's "patient modesty." But he cites no authority for the proposition that a lack of respect for patient modesty would have converted the offense into simple assault. Similarly, he cites a prosecution expert's testimony that Alkhas violated the standard of care by failing to have a chaperone present for the examination. He cites no authority for the proposition that this failure could have converted the offense into assault or battery.

In the absence of substantial evidence to support convictions for assault or battery, trial counsel's performance was not deficient for failing to request instructions on those offenses. (*People v. Dennis* (1998) 17 Cal.4th 468, 541 [a failure to request a lesser included offense does not amount to deficient performance where the defendant is not entitled to such an instruction].) Even assuming, however, that trial counsel should have requested instructions on assault or battery, Alkhas has not shown a reasonable probability that he would have enjoyed a different outcome. That is, he has not shown the requisite prejudice to support his claim of ineffective assistance of counsel. Accordingly, we conclude this claim is without merit.

In a closely related claim, Alkhas contends the trial court erred by failing to instruct the jury sua sponte on simple battery regardless of counsel's request not to issue such an instruction. He argues that substantial evidence warranted the instruction because Danielle testified that Alkhas ended the examination abruptly, and his hands were shaking. He contends the jury could have concluded from this evidence that, although he "initiated a reasonable exam, at some point along the way his intentions may have changed, and that is why he stopped the examination abruptly before going further." This claim is no more than pure speculation, and is unsupported by substantial evidence.

Alkhas himself testified that he ended the exam because he had successfully completed his diagnosis, and after he had checked the ischial tuberosity, "We were done." No reasonable juror could have inferred that he stopped the examination because "his intentions may have changed." In the absence of substantial evidence for this theory, the trial court had no duty to issue an instruction on simple battery.

C. Admission of Testimony by Anne Marie Under Evidence Code Section 1108

Alkhas contends the trial court erred by admitting the testimony of Anne Marie under Evidence Code section 1108. As set forth above in section I.B.3, Anne Marie testified that Alkhas had molested her on multiple occasions when she was five to seven years old by touching her breasts and vagina. Alkhas contends the testimony should have been excluded based on the passage of time, the victim's delay in recall, the lack of similarity to the charge offenses, and the prejudicial impact of "child molest" evidence. The Attorney General contends admission of this evidence was not an abuse of discretion.

1. Background

Alkhas moved pretrial to exclude evidence of the alleged touching incidents. The prosecution moved to admit the evidence under Evidence Code section 1108. The trial court admitted the evidence after setting forth a detailed explanation of the grounds for doing so. First, the court noted the similarities between the alleged conduct. In both cases, Alkhas was substantially older than the victims, and in both cases he held a position of trust and authority over the victims. The court noted that both sets of events occurred independently of each other, and there was no indication the victims had colluded, thereby giving weight to the similarities between the incidents. The court also found that Anne Marie had made "fresh complaint" statements to relatives and a counselor prior to hearing about the allegations involving Danielle. The court further noted that both victims were assaulted while alone and isolated. The court acknowledged the inflammatory potential of child molestation allegations, but the court found the

danger of undue prejudice from the evidence did not substantial outweigh its probative value. Accordingly, the court found the evidence admissible under Evidence Code sections 1108 and 352. The court further found the evidence admissible under Evidence Code section 1101, subdivision (b), to show intent and absence of mistake.

2. Legal Principles

Evidence Code section 1101 generally excludes "evidence of a person's character or a trait of his or her character . . . when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) But Evidence Code section 1108 contains an exception to that general rule, stating that in "a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code] Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352." (Evid. Code, § 1108, subd. (a).) Evidence Code section 352 gives trial courts discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

When determining whether to admit evidence under Evidence Code section 1108, a trial court should consider the prior conduct's "nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta* (1999) 21 Cal.4th 903, 917 (*Falsetta*).)

We review a trial court's decision to admit evidence under Evidence Code section 1108 for an abuse of discretion. (*People v. Loy* (2011) 52 Cal.4th 46, 61.)

3. Admission of the Evidence Was Not an Abuse of Discretion

Alkhas asserts that the inflammatory nature of the allegations made the evidence substantially more prejudicial than probative. He points to several factors weighing against the probative value of the evidence, including the fact that the alleged incidents occurred more than 20 years ago, the fact that Anne Marie waited years before disclosing the incidents, and various dissimilarities between the prior conduct and the charged conduct—e.g., the fact that one victim was a child while the charged victim was 18 years old. He further contends there was danger of confusing the jury, and the testimony required an undue consumption of time.

We are not persuaded. The trial court addressed Alkhas's arguments and set forth its reasons for admitting the evidence. The court disagreed that the incidents were dissimilar and accurately identified certain similarities between the allege conduct—i.e., the difference in ages, and the abuse of trust or authority. The court considered the inherently inflammatory nature of the prior conduct and the court was obviously aware of the time frames involved. The court also considered ways of making the testimony less inflammatory by sanitizing certain details of the prior victim's testimony—e.g., her age at the time of the conduct—but the court concluded it was not possible to sanitize the testimony accurately. Finally, the court considered but rejected the claim that the evidence would result in an undue consumption of time. Trial courts generally have the discretion to permit multiple witnesses in litigating prior conduct. (*People v. Story* (2009) 45 Cal.4th 1282, 1288-1290 [no abuse of discretion in admitting testimony by multiple prior victims].)

The court's factual findings are supported by the record, and its weighing of the various factors both for and against admission were consistent with the approach set forth in *Falsetta*. (*Falsetta, supra*, 21 Cal.4th at p. 917.) The court acted within its discretion

by finding the potential for undue prejudice did not substantially outweigh the probative value of the evidence. Accordingly, we conclude this claim is without merit.

D. Ineffective Assistance of Counsel in Jury Selection

Alkhas, who is of Iranian descent, contends his trial counsel provided ineffective assistance in failing to adequately question a juror about her racial or ethnic biases and failing to execute a preemptory strike against her. The Attorney General contends Alkhas failed to show trial counsel did not intentionally do so for tactical purposes.

1. Background

Before voir dire, members of the jury panel answered written questionnaires. A juror identified by the number 59 on one questionnaire answered a question about Iranians as follows: "[Q:] Would you think a person holds certain religious or political views or views about women simply because that person is from Iran?" "[A:] Men from Iran generally believe women are below them & treat them so." Trial counsel did not specifically ask the juror about this question in voir dire.[4]

Defense counsel did, however, question the juror about other answers she gave on the questionnaire. On the questionnaire, the juror answered affirmatively to a question about whether she had ever been sexually touched or molested as a child. When the court asked her whether she had been molested as a child, she replied, "I was when I was like 10 or 11 by a friend, and at that time I didn't know what it was, you know. And—but it didn't affect me at all." The court further inquired, "[D]o you think you can separate out what happened to you and listen to this case and make sure you're deciding this case based on the facts and the evidence of this trial?" The juror answered affirmatively and

[4] The Attorney General contends Alkhas has not shown that the juror who answered the questionnaire was the same juror referenced in the relevant part of the voir dire transcript. Given the similarity between the juror's answers on the questionnaire and her answers in voir dire, we conclude Alkhas has accurately matched the juror to the questionnaire. Moreover, it appears from the record that the same juror was seated for trial.

explained that her professional training as a hospice nurse had allowed her to develop an ability to remain neutral in response to emotional situations.

Trial counsel for Alkhas questioned the juror further about her experience being touched or molested as a child. First, counsel asked her to explain again her statement that her experience did not have any effect on her. The juror reaffirmed that she had not been emotionally affected by the incident. Trial counsel pressed her further: "[Q:] So what I'm wondering about is you kind of described this, but I want to make sure. Your profession—your professional training is you've got to separate your understandable emotions you might have and certain things you see, which can be pretty horrific, I'm sure." "[A:] Mmm-hmm." [. . .] "[Q:] But you feel completely satisfied that you can separate yourself and be really objective in a case like this one?" "[A:] Definitely." Counsel did not exercise a peremptory strike against the juror, and she was later seated on the jury for the duration of the trial.

2. Trial Counsel's Performance During Jury Selection Did Not Constitute Ineffective Assistance

Alkhas contends his trial counsel provided ineffective assistance by failing to question the prospective juror about her racial or ethnic biases and failing to execute a peremptory strike against her. But tactical decisions by counsel are rarely grounds for ineffective assistance. (*People v. Bolin* (1998) 18 Cal.4th 297, 317 [no reversal when alleged failure to object may have been an informed tactical choice within the range of reasonable competence].) And Alkhas has not met his burden to show counsel did not make a tactical decision, nor that the decision was outside the range of reasonable competence. To the contrary, the record strongly suggests counsel's decision was tactical and reasonable. His questioning of the prospective juror demonstrated he had read her questionnaire answers, implying he was aware of her answer to the question about Iranians. And counsel's focus on the juror's prior experience being touched as a child, in combination with her insistence she could remain neutral, suggests counsel believed she

could be a favorable juror for the defense. Such a tactical decision not to strike a prospective juror generally does not constitute deficient performance. (*People v. Romero & Self* (2015) 62 Cal.4th 1, 45 ["Because the use of peremptory challenges is inherently subjective and intuitive, an appellate record will rarely disclose reversible incompetence in this process."]) Nor does the decision not to voir dire a prospective juror constitute deficient performance. (*People v. Freeman* (1994) 8 Cal.4th 450, 485 [counsel was entitled to voir dire the prospective jurors in the manner he felt was best for his client].)

Even assuming counsel's performance was deficient, Alkhas cannot show he was prejudiced. The trial court instructed the juror to put aside any preconceived notions or emotions she might have about the case, and the juror repeatedly insisted she could do so. Absence a showing to the contrary, we presume the jurors followed the court's instructions. Alkhas has made no showing that there was a reasonable probability he would have enjoyed a different outcome if trial counsel had questioned the juror further or struck her from the jury. (*Ledesma, supra*, 43 Cal.3d at pp. 217-218.) Accordingly, we conclude this claim is without merit.

E. Cumulative Error

Alkhas contends the cumulative impact of prejudice from multiple errors requires reversal. Because we find no errors, there is no prejudice to cumulate.

In the same section of his opening brief, Alkhas raises several brief claims of ineffective assistance of counsel. He claims trial counsel failed to object to the erroneous admission of victim impact evidence; failed to call appropriate character witnesses; and failed to object to the prosecution's improper assertion of a civil standard of care. Alkhas offers little or no argument or authority to support these claims. "To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error." (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.) Regardless, upon consideration of these claims, we conclude

Alkhas has failed to show deficient performance by counsel, and he has not shown he was prejudiced by any of these asserted errors, either in isolation or cumulatively.

Accordingly, we conclude these claims fail. We will affirm the judgment.

III. DISPOSITION

The judgment is affirmed.

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Greenwood, P.J.

WE CONCUR:

_____
Bamattre-Manoukian, J.

_____
Danner, J.

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